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No. 03-1522

IN THE

Supreme Court of the United States

ALBERT DURRUTHY,

Petitioner,

v.

JENNIFER PASTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Bruce W. Sanford
Robert D. Lystad
Bruce D. Brown
BAKER & HOSTETLER, LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
(202) 861-1707
Counsel for the Society of Professional Journalists

Robert A. Long, Jr.
Counsel of Record
Kurt A. Wimmer
John H. Fuson
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000
Counsel for the National Press Photographers Association

Kathleen A. Kirby
WILEY REIN & FIELDING
1776 K Street, NW
Washington, DC 20006
(202) 719-3360
Counsel for the Radio-Television News Directors Association

Lucy Dalglish
Reporters Committee for Freedom of the Press
1815 N. Fort Myer Dr., Suite 900
Arlington, VA 22209
(703) 807-2100
Counsel for the Reporters Committee for Freedom of the Press

IN THE SUPREME COURT OF THE UNITED STATES

ALBERT DURRUTHY,

Petitioner,

v.

JENNIFER PASTOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the National Press Photographers Association, the Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists hereby move for leave to file the accompanying brief as *amici curiae* in support of petitioner.

The National Press Photographers Association is a non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution, in all news media. The NPPA vigorously promotes freedom of the press in all its forms. The NPPA's more than 10,000 members include still and television photographers, editors, students and representatives of businesses that serve the photojournalism industry.

The Radio-Television News Directors Association is a professional association devoted to electronic journalism. The RTNDA's more than 3,000 members include local and network news executives, educators, students, and others in the radio, television, cable and other electronic media worldwide.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedoms of information interests of the news media. The RCFP has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, the Society promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Each of the *amici curiae* has a strong interest in this case, which raises important questions concerning the First Amendment rights of the press to engage in newsgathering activities. The Petitioner, Albert Durruthy, a free-lance cameraman, was filming events in downtown Miami after federal officials removed Elián González from his uncle's home. While Durruthy was filming the arrest of another cameraman, police officers tackled and arrested him. Durruthy brought this suit under 42 U.S.C. § 1983 alleging violations of his constitutional rights against one of those officers and the City of Miami. The officer moved for summary judgment on the basis of qualified immunity, which the trial court

denied. On appeal, however, the Eleventh Circuit reversed.

The Eleventh Circuit's decision is inconsistent with this Court's prior ruling in *Hope v. Pelzer*, 536 U.S. 730 (2002). Furthermore, the Eleventh Circuit's decision, which shields a government official from liability for improper conduct motivated solely to prevent newsgathering, will have a chilling effect on First Amendment rights. This Court has recognized that newsgathering is a necessary antecedent to news reporting, and therefore is protected by the First Amendment. When government officials restrict the press in its ability to gather news, as occurred in this case, the result is to limit the news itself.

Petitioner has consented to the filing of this brief, and a letter of consent from Petitioner's counsel has been filed with the Clerk. This motion is necessary because Respondent has refused to consent to the filing of this brief.

Respectfully submitted,

Bruce W. Sanford
Robert D. Lystad
Bruce D. Brown
BAKER & HOSTETLER, LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
(202) 861-1707

Counsel for the Society of Professional Journalists

Robert A. Long, Jr.
Counsel of Record
Kurt A. Wimmer
John H. Fuson
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for the National Press Photographers Association

Kathleen A. Kirby
WILEY REIN & FIELDING
1776 K Street, NW
Washington, DC 20006
(202) 719-3360

Counsel for the Radio-Television News Directors Association

Lucy Dalglish
Reporters Committee for Freedom of the Press
1815 N. Fort Myer Dr.,
Suite 900
Arlington, VA 22209
(703) 807-2100

Counsel for the Reporters Committee for Freedom of the Press

QUESTION PRESENTED

The National Press Photographers Association, the Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists will address the following question:

Whether, under the First and Fourth Amendments, a police officer may arrest a journalist solely for the purpose of preventing the journalist from gathering news.

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The National Press Photographers Association, the Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists submit this brief as *amici curiae* supporting Petitioner Albert Durruthy.[1]

INTEREST OF THE *AMICI CURIAE*

The National Press Photographers Association is a non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution, in all news media. The NPPA vigorously promotes freedom of the press in all its forms. The NPPA's more than 10,000 members include still and television photographers, editors, students and representatives of businesses that serve the photojournalism industry.

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[1] Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

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Each of the *amici curiae* has a strong interest in this case, which raises important questions concerning the First Amendment rights of the press to engage in newsgathering activities. This Court has recognized that newsgathering is a necessary antecedent to news reporting, and therefore is protected by the First Amendment. When government officials restrict the press in its ability to gather news, as occurred in this case, the result is to limit the news itself.

STATEMENT OF THE CASE

This case arises from events in April 2000 surrounding the plight of Elián González and the federal government's efforts to return him to his father in Cuba.[2] At 5:30 AM on April 22, 2000, federal officials removed Elián González from his uncle's home in Miami. Pet. App. 38a. In response to that action, protestors gathered in downtown Miami, and sporadic episodes of rioting ensued. *Id.* at 3a, 38a.

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[2] Elián González, at the time a five-year-old Cuban boy, was rescued by American fishermen after surviving a shipwreck while trying to reach the United States with his mother. Federal marshals forcibly removed González from the home of his Miami relatives after they refused the orders of the U.S. Department of Justice to turn him over.

Later that morning, Miami photojournalist Albert Durruthy was filming demonstrations on Flagler Street in downtown Miami. Pet. App. 38a. Police had closed the downtown area to vehicular traffic and by approximately 11:00 AM, had cleared the intersection of Flagler Street and 27th Avenue of protestors. *Id.* At about that time, police arrested and handcuffed NBC cameraman Bruce Bernstein. *Id.* Durruthy attempted to film Bernstein's arrest, but as he approached, the arresting officer instructed Durruthy to return to the sidewalk. *Id.* Durruthy promptly complied, walking backward toward the sidewalk as he continued to film. *Id.*

While Durruthy was moving toward the sidewalk, Officer Jennifer Pastor, who was standing in a line of officers approximately 60 feet away, broke toward Durruthy. Pet. App. 27a. Officer Pastor acted without instructions or permission from any superior officer. *Id.* She admitted knowing that Durruthy, who was carrying a large television camera and was accompanied by a soundman, was a member of the press. *Id.* Officer Pastor and at least two other officers forced Durruthy to the ground and kneeled on his back. *Id.* Despite Durruthy's protestations that he would go peacefully and that his injured arm would not bend backward, the officers pulled his hands behind him, secured his wrists, and pulled him to his feet by his arms. *Id.* at 39a. At no time did Durruthy attempt to resist the officers, nor do the undisputed facts indicate he ever presented any danger to them. *Id.* at 50a-51a. Durruthy was detained in a police van without medical care for six hours before being released. *Id.*

Durruthy subsequently brought an action under 42 U.S.C. § 1983 against Officer Pastor and the City of Miami for illegal arrest and use of excessive force in violation of his rights under the Fourth Amendment, as well as for state law claims for assault, battery and false

arrest. In response to Durruthy's claims, Officer Pastor moved for summary judgment on the basis of qualified immunity. The motion was denied by the U.S. District Court. Pet. App. 53a. On appeal, a divided panel of the Eleventh Circuit reversed, holding that since there was probable cause to arrest Durruthy – based on a subsequently asserted jay-walking statute – Officer Pastor's conduct was reasonable under the Fourth Amendment and she violated no clearly established right. *Id.* at 25a.

ARGUMENT

The facts in this case, insofar as they are presented at the summary judgment stage, show that a journalist, Durruthy, actively engaged in newsgathering and following police instructions, was unlawfully arrested with undue force and detained specifically to prevent his continued videotaping of police activity at an event of national interest. The First Amendment does not permit such a bold attack on newsgathering.

1. This Court has recognized that newsgathering is a necessary antecedent to news reporting, and therefore is itself protected by the First Amendment. As the Court has stated, "without some protection for seeking out the news, freedom of the press could be eviscerated" *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972); *see also id.* at 728 (Stewart, J., dissenting) ("No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised."). *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("[f]ree speech carries with it some freedom to listen," which is the essence of newsgathering). Lower courts have likewise recognized that newsgathering is constitutionally protected. *See, e.g., In*

re Fitch, Inc., 330 F.3d 104, 108 (2d Cir. 2003) (the disruption of newsgathering activity is "particularly inimical to the vigor of a free press") (quoting *O'Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277 (1988)); *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987), (subject to certain qualifications, "the process of newsgathering is a protected right under the First Amendment"), *cert. denied*, 481 U.S. 1015 (1987); *see also* Bunker et al., *Triggering the First Amendment: Newsgathering Torts and Press Freedom*, 4 COMM. L. & POL'Y 273, 288 (1999) (discussing levels of First Amendment protection for newsgathering); Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 843-44 (1971) (the right to gather information is "logically antecedent and practically necessary" to an effective freedom of the press).

When government officials prevent the press from gathering news, their action implicates more than just the interests of the press. The press, "as an agent of the public at large," represents the interests of the public by supplying information and creating the conditions under which discussion and debate essential to the democratic process can take place. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (observing that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," and that the Framers "thoughtfully and deliberately selected" the press to receive express constitutional protection so that it could "improve our society and keep it free"); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.").

These concerns apply directly to this case, which arises from the public debate that surrounded the Elián González affair. The press, through effective newsgathering, plays a critical role in informing any such national discussion. The Eleventh Circuit's decision, however, shields a government official from liability for improper conduct motivated solely to prevent lawful newsgathering. The decision, if not corrected, will have a chilling effect on First Amendment rights. As explained above, this Court has consistently recognized that newsgathering is a necessary antecedent to news reporting, and is protected by the First Amendment. When government officials restrict the press in its ability to gather news, as occurred in this case, the result is to place limits on news itself.

2. Petitioner submitted evidence that Officer Pastor arrested him solely to prevent him from engaging in newsgathering. The Eleventh Circuit majority held that this evidence is irrelevant, invoking the general principle that an officer may arrest a person for an invalid reason, but still be entitled to qualified immunity if the arrest can be justified on another ground. Citing, among other cases, *Whren v. United States*, 517 U.S. 806, 813 (1996), the court held that "Pastor's personal motivation for arresting Durruthy is irrelevant to the determination whether she had probable cause." *Durruthy v. Pastor*, 351 F.3d 1080, 1088 (11th Cir. 2003).

In *Whren*, police stopped a suspicious vehicle for a routine traffic violation. In the course of the stop, the police observed two large bags of crack cocaine in the vehicle. They proceeded to arrest the driver and passengers on various drug-dealing charges. In challenging their convictions, the defendants argued that the police did not have probable cause to detain them prior to the traffic stop and that the asserted traffic

violation was merely a pretext to investigate perceived suspicious activity.

Absent from *Whren* was any finding that the traffic stop was motivated by an unconstitutional purpose. In this case, in contrast, Officer Pastor arrested Durruthy to prevent his continued newsgathering, a constitutionally protected activity. *Branzburg,* 408 U.S. at 684 ("without some protection for seeking out the news, freedom of the press could be eviscerated"). The basis for Durruthy's arrest was therefore unconstitutional, a fact which Officer Pastor either knew or should have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

Even if an officer has discretion to arrest individuals for violating a general law (such as a law against standing in the street or driving with a broken taillight), the officer is forbidden to exercise that discretion on the basis of an unconstitutional reason. Thus, for example, an officer could not arrest only African-American citizens standing in the street on the basis of their race. *See Whren*, 517 U.S. at 813 (recognizing "that the Constitution prohibits selective enforcement of the law based on considerations such as race"); *see also United States v. Akram*, 165 F.3d 452, 455 (6th Cir. 1999) (noting that a traffic signal violation provided probable cause for traffic stop, but that the stop would be invalid if "the motorist can demonstrate that the police have violated some other provision of the Constitution"). Similarly, a police officer may not exercise her discretion to arrest an individual solely on the basis of whether the individual is engaged in the constitutionally protected activity of gathering news. As Judge Stahl noted in his dissent below, "it is patently obvious to any observer of the videotape evidence that the sole reason for Pastor's conduct was that she and the other officers wanted Durruthy to stop filming the arrest of the NBC cameraman." *Durruthy*, 351 F.3d at 1097 (Stahl, J.,

dissenting). Because Officer Pastor's motive was unconstitutional, the arrest was unlawful.

In similar circumstances, this Court has rejected efforts to hide behind the veil of official discretion. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (while "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried," the prosecutor may not exercise that discretion for an unconstitutional reason, *e.g.*, "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant") (internal citations and quotation marks omitted); *Wade v. United States*, 504 U.S. 181, 185 (1992) (prosecutor's discretionary authority to recommend a downward departure in sentencing for rendering substantial assistance to the government "is subject to constitutional limitations"). The constitutional principles applicable to the discretionary acts of prosecutors apply equally to the discretionary acts of police officers.

Whren's general rule permitting the government to offer pretextual reasons for an arrest does not foreclose inquiry into the actual purpose behind state action where, as here, another constitutional right is implicated. As this Court stated in justifying consideration of the purpose of a motor vehicle checkpoint under the Fourth Amendment, "courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive government conduct from that which is lawful." *City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000).

This case is distinguishable from *Whren* for another reason. The officers in *Whren* asserted the lawful basis for the traffic stop when the stop was made, not after the fact. In this case, however, Officer Pastor did not conjure

up the purported lawful basis for arresting Durruthy until long after the arrest was made, and then, only to shield a purpose she knew or should have known was unlawful. As Judge Stahl noted in his dissent, "we should 'be troubled by an argument suggesting that a legitimate basis for an arrest identified *only after* the arrest would provide sufficient grounds therefor.'" *Durruthy*, 351 F.3d at 1097 (Stahl, J., dissenting) (quoting *Rogers v. Powell*, 120 F.3d 446, 453 n.5 (3d Cir. 1997) (emphasis added by Judge Stahl)). This is especially true here where the arrest was perpetrated to block exercise of constitutionally protected newsgathering.[3]

3. At the very least, Officer Pastor may not selectively enforce the jay-walking statute to prevent lawful newsgathering. In this sense, this case is similar to *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), in which three African-American ministers led a peaceful march through downtown Birmingham. Shortly after the march began, police halted it and arrested the ministers for violating an ordinance prohibiting public demonstrations held without a city permit. This Court reversed the convictions, holding that the arbitrary nature of the statute and its selective enforcement did not guarantee adequate First Amendment protections. *Id.* at 158-59. Likewise in this case, Officer Pastor may not arbitrarily and selectively enforce a statute solely to limit newsgathering.

4. Even if the Court were to ignore the evidence of Officer Pastor's actual reason for arresting Petitioner, the grounds she asserts do not show that she had probable cause for the arrest. Officer Pastor initially asserted that

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[3] This case also differs from *Whren* in that Officer Pastor did not actually suspect that Durruthy was engaged in criminal behavior at the time of the arrest. *Whren*, 517 U.S. at 809.

she arrested Durruthy for violating Fla. Stat. § 843.02, which makes it a misdemeano to "resist, obstruct, or oppose any officer ... without offering or doing violence to the person of the officer." According to Officer Pastor, "arguable probable cause existed because [Durruthy] interfered with the police by walking out into the street while the police were trying to clear the street." *Durruthy v. City of Miami*, 235 F. Supp. 2d 1291, 1297 (S.D. Fla. 2002). The facts, however, do not come close to supporting this as a basis for the arrest. Far from "resist[ing], obstruct[ing], or oppos[ing]" an officer, Durruthy was clearly obeying officer instructions that he return to the sidewalk. Based on findings by the district court, "as soon as the police instructed [Durruthy] to return to the sidewalk he immediately obeyed. Plaintiff walked backwards slowly in the direction of the sidewalk. It was while he was retreating that Pastor arrested him. Thus, [Durruthy] clearly complied with the instruction of the police officer to some extent." *Durruthy*, 235 F. Supp. 2d at 1297. The district court went on to consider whether Durruthy "did not stop filming and did not move quickly" in response to an officer's instructions. But, the court concluded, that based on the facts presented, that Durruthy's actions could not "have given rise to the impression that he was resisting, obstructing or opposing the officer." *Id.* When Durruthy and his attorney met with the State Attorney several weeks later, Durruthy's counsel showed the State Attorney the videotape of Officer Pastor's arrest. The State Attorney immediately dropped all charges against Durruthy. *Durruthy*, 351 F.3d at 1096.

Officer Pastor alternately claims she could have arrested Durruthy for violating Fla. Stat. § 316.130, a jay-walking statute that, among other things, prohibits pedestrians from walking "along and upon the portion of a roadway paved for vehicular traffic." The district court found, however, that (1) there was no vehicular traffic in

the roadway; (2) Durruthy was an obvious member of the media acting within the scope of his journalistic duties; and (3) Durruthy was acting on permission and at the time of the arrest was complying with all officer instructions. *See* Pet. App. 45a. These facts undermine the validity of the alternative basis for the arrest.

5. At a minimum, summary judgment was premature in this case, particularly given the First Amendment freedoms at stake. Judge Stahl identified several unresolved questions of fact, including whether Durruthy or other members of the media had permission to be in the street; whether Officer Pastor was aware that such authorization had been granted; and whether she was aware she was violating Durruthy's clearly established constitutional rights when she pinned him to the street and arrested him. *Durruthy*, 351 F.3d at 1097 (Stahl, J., dissenting). These disputed facts are sufficient to require the denial of a motion for summary judgment.

Also relevant to the probable cause inquiry is the fact that Durruthy was seized while engaged in constitutionally protected activity. In *Zurcher v. Stanford Daily,* 436 U.S. 547, 564 (1978), this Court stated that Fourth Amendment requirements should be applied with "scrupulous exactitude" when the items seized are protected by the First Amendment. *See also Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) (stating that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material"). When seizures implicate newsgathering activity presumptively protected by the First Amendment, the Fourth Amendment should be applied with "scrupulous exactitude," and the reasonableness determination should take account of the fact that the search or seizure prevents or interferes with activity that is protected by the First Amendment. That standard is not met here.

6. For a constitutional right to be clearly established, its contours must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citations omitted)).

As noted above, decisions of this Court and other courts recognize that newsgathering activities are protected under the First Amendment. Moreover, the official policy of the City of Miami is that "no warrantless arrest of media personnel for non-felonies acts arising out of the pursuit of the news gathering function will be made without the express authority of the senior on-duty commanding officer or the staff duty officer." Pet. Br. 4. The fact that Officer Pastor's actions violated her own department's policy is certainly relevant to whether she was "on notice" that her conduct "violat[ed] established law." *Hope*, 536 U.S. at 741 (citing *United States v. Lanier*, 520 U.S. 259 (1997)). At a minimum, she had "fair warning" that an arrest of Durruthy to prevent lawful newsgathering was unconstitutional. *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce W. Sanford
Robert D. Lystad
Bruce D. Brown
BAKER & HOSTETLER, LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
(202) 861-1707

Counsel for the Society of Professional Journalists

Robert A. Long, Jr.
Counsel of Record
Kurt A. Wimmer
John H. Fuson
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
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Counsel for the National Press Photographers Association

Kathleen A. Kirby
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Counsel for the Radio-Television News Directors Association

Lucy Dalglish
Reporters Committee for Freedom of the Press
1815 N. Fort Myer Dr.,
Suite 900
Arlington, VA 22209
(703) 807-2100

Counsel for the Reporters Committee for Freedom of the Press

July 12, 2004